

Schedule 23

Sub-Contractor Direct Agreement

Dated

200[◆]

[Authority]

[Sub-Contractor]

[Service Provider]

[Guarantor]

**Authority Sub-Contractor Direct
Agreement**

Contents

	Clause	Page
1	Definitions and Interpretation	4
2	Warranty	4
3	Copyright	5
4	Assignment	5
5	Step in.....	5
6	Continuing Service	8
7	Assistance	9
8	Extraneous rights.....	9
9	Contracts (Rights of Third Parties) Act 1999	10
10	Savings.....	10
11	Guarantee	10
12	Application of TUPE on expiry or termination	12
13	Severability	12
14	Waiver.....	12
15	Governing law and interpretation	12

Street Lighting Procurement Pack – Model Documentation

This Agreement is made on the day of 200[◆]

Between¹

- (1) [◆] of [◆] (which expression includes its permitted successors in title and assigns) (the **Authority**);
- (2) [◆] whose registered number is [◆] and whose registered office is at [◆] (the **Sub-Contractor**);
- (3) [◆] whose registered number is [◆] and whose registered office is at [◆] (the **Service Provider**); and
- (4) [◆] whose registered number is [◆] and whose registered office is at [◆] (the **Guarantor**).

Whereas

- (A) The Service Provider has entered into a contract (the **Contract**) with the Authority pursuant to which the Service Provider has agreed to undertake the Project.
- (B) The Service Provider and the Sub-Contractor have entered into a sub-contract (the **Sub-Contract**), under which the Sub-Contractor has agreed to provide services (the **Sub-Contract Services**) required for the purposes of the Project.
- (C) The Guarantor is [the parent company] of the Sub-Contractor and agrees to guarantee to the Authority the due and proper performance by the Sub-Contractor of its obligations under this Agreement.

It is agreed in consideration of the sum of one pound (£1) paid by the Authority, receipt of which the Sub-Contractor acknowledges, as follows:

1 Definitions and Interpretation

Unless expressly defined otherwise in this Agreement, any defined term in this Agreement shall have the same meaning given to such term in the Sub-Contract.

2 Warranty

- 2.1 The Sub-Contractor warrants to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil all of its duties and obligations expressed in, or arising out of, the Sub-Contract.
- 2.2 The Sub-Contractor agrees that it will not amend the terms and conditions of the Sub-Contract without the prior written approval of the Authority (not to be unreasonably withheld).

¹ It has been suggested that the Senior Lender be made party to this contract and provisions be included herein to effectively subordinate the Authority's powers under this Agreement until the Senior Lender has discharged its security over the project. It is suggested that such provisions are better dealt with in the Senior Lender's Direct Agreement with the Authority.

- 2.3 Notwithstanding anything in this Agreement and notwithstanding any payments which may be made by the Authority to the Sub-Contractor, the Authority and the Sub-Contractor will not be under any obligation to each other nor will any party have any claim or cause of action against the others unless and until the Authority has given written notice to the Sub-Contractor pursuant to clause 5.3 or clause 5.7 of this Agreement.

3 Copyright

The Sub-Contractor grants to the Authority like rights and assumes like obligations to those which are granted to and assumed in favour of the Service Provider under the Sub-Contract in connection with copyright, Intellectual Property Rights, Trade Marks and Data.

4 Assignment

- 4.1 The benefit of and the rights of the Authority under this Agreement may be assigned without the consent of the Sub-Contractor on two (2) occasions only and the Authority will notify the Sub-Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment.
- 4.2 The Sub-Contractor shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with clause 4.1 is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement, (whenever happening) by reason that such person is an assignee and not the named promisee hereunder.

5 Step in²

- 5.1 The Sub-Contractor warrants to the Authority that the Sub-Contractor shall not terminate or treat as terminated the Sub-Contract (or its employment thereunder), or discontinue the performance of the Sub-Contract Services, without first giving to the Authority not less than thirty (30) Business Days' prior notice of the Sub-Contractor's intention to do so, specifying the grounds for so doing and stating the amount (if any) of monies then outstanding under the Sub-Contract and setting out any other existing liabilities or unperformed obligations of the Service Provider under the Sub-Contract.
- 5.2 If the Authority serves on the Sub-Contractor a notice in accordance with clause 5.3, the Sub-Contractor shall not terminate or treat as terminated the Sub-Contract (or its employment thereunder), or discontinue the performance of the Sub-Contract Services, but service of such notice shall not prejudice any other right or remedy the Sub-Contractor may have under the Sub-

² Step in has the disadvantage of requiring the Authority to pay outstanding sums due to the Sub-Contractor (see clause 5.6) and being responsible for breaches by the Service Provider. See the alternative regime in clause 6 and consider whether both options are required.

Contract or may acquire by reason of any breach of the obligations of the Authority under this clause 5.

- 5.3 Within the period of notice referred to in clause 5.1 (as extended pursuant to clause 5.9 (if applicable)) unless the employment of the Sub-Contractor under the Sub-Contract shall have terminated previously, if the Authority serves upon the Sub-Contractor a notice to do so, the Sub-Contractor shall thereafter accept the instructions of the Authority to the exclusion of the Service Provider under the Sub-Contract.
- 5.4 As against the Service Provider and the Authority, the Sub-Contractor shall be entitled and obliged to rely upon and to comply with such notice served by the Authority under clause 5.3 or clause 5.7, and shall not make any enquiry into the entitlement of the Authority as against the Service Provider to serve such notice.
- 5.5 As from the date of service of notice under clause 5.3, the Authority shall assume all the rights and (save as referred to in clause 5.6) perform all the obligations of the Service Provider under the Sub-Contract, provided that this shall not affect or derogate from any right of action the Service Provider may have against the Sub-Contractor in respect of any breach of duty of the Sub-Contractor under, or in connection with, the Sub-Contract happening prior to the date of service of notice by the Authority under clause 5.3.
- 5.6 The Authority shall within fifteen (15) Business Days after serving notice under clause 5.3 or under clause 5.7, pay to the Sub-Contractor an amount equal to the sum then owing to the Sub-Contractor under the Sub-Contract for services properly performed and shall perform any other obligations of the Service Provider which are existing and unperformed as at the date of the notice served under clause 5.3 (and which are capable of performance) and in each case provided that the same are properly set out in the Sub-Contractor's notice given pursuant to clause 5.1, or have properly arisen after the date of service of such notice provided that:
- (a) if any such amounts, obligations or liabilities are disputed by the Authority in accordance with the dispute resolution procedure in the Sub-Contract, the Authority shall only pay such amounts, perform such obligations and incur such liabilities found to be due as a result of such procedures; and
 - (b) the Authority shall not be liable for, nor shall it be obliged to make any payment to the Sub-Contractor in respect of any work and/or services provided nor any materials supplied nor any other claims or demands under the Sub-Contract to the extent that either the Authority has already made payment in respect of the same to the Service Provider pursuant to the Contract or the Authority is liable to make payment in respect of the same to the Service Provider pursuant to the Contract.

- 5.7 The Sub-Contractor further covenants with the Authority that if the Contract has been terminated or is otherwise of no force or effect or if notice to terminate the Contract has been served, the Sub-Contractor, if requested by the Authority, by notice in writing and subject to clauses 5.5 and 5.6, shall accept the instructions of the Authority to the exclusion of the Service Provider in respect of the Sub-Contract Services upon the terms and conditions of the Sub-Contract and shall, if so requested in writing, enter into a novation agreement whereby the Authority is substituted for the Service Provider under the Sub-Contract or, if the Sub-Contract has been terminated, will enter into a new contract with the Authority on the same terms as the Sub-Contract but with such revisions as are reasonably necessary to reflect altered circumstances.
- 5.8 Upon payment by the Authority in accordance with clause 5.6 of an amount equal to the relevant sum owing from the Service Provider, the Sub-Contractor shall assign to the Authority all the Sub-Contractor's rights against the Service Provider in respect of such unpaid sum, and shall pay to the Authority any of the same subsequently received by the Sub-Contractor from the Service Provider.
- 5.9 Where any rights analogous to those granted in this clause 5 are given by the Sub-Contractor in favour of any of the Senior Lenders, the exercise of such rights shall have priority over those granted to the Authority pursuant to clause 5.3. In such case the thirty (30) Business Day notice period referred to in clause 5.1 shall be extended to a period that is twenty (20) Business Days commencing on the earlier of:
- (a) the date upon which such rights of the Senior Lenders expire or terminate; or
 - (b) the date that the Senior Lenders (or any security trustee acting on its behalf) notifies both the Authority and the Sub-Contractor that it does not wish to exercise its rights; or
 - (c) on the [Step Out Date] under and ascertained in accordance with the agreement entered into between the Sub-Contractor and the Senior Lenders in relation to the Project and as notified to the Authority by the Sub-Contractor and/or the Senior Lenders (or any security trustee acting on its behalf),
- and the Authority shall not be entitled to exercise its right to serve notice under clause 5.1 until the earlier of such dates.³

³ The provisions of clause 5.9 to be reviewed on a project specific basis to ensure consistency with the Sub-Contractor/Senior Lender's Direct Agreement. Note that Senior Lenders may require that the Authority cannot exercise its rights under clause 5 and/or clause 6 until the Senior Lenders have had the opportunity to exercise its rights and/or has been paid in full. This may result in the Authority being unable to obtain a continuing service at the time it needs it i.e. on termination of the Contract. These issues should be dealt with in the Senior Lender's Direct Agreement and the latest SOPC3 guidance/drafting followed.

- 5.10 The Sub-Contractor shall copy to the Authority any notice of intended termination of the Sub-Contract and all other information in relation to such notice provided by the Sub-Contractor to the Senior Lenders at the same time as it is provided to the Senior Lenders.
- 5.11 The Authority may by notice in writing to the Sub-Contractor appoint another person to exercise its rights under this clause 5, subject to the Authority remaining liable to the Sub-Contractor as guarantor for its appointee in respect of its obligations under this Agreement.
- 5.12 As from the date of service of notice under clause 5.3 or 5.7 to the extent that the Sub-Contract operates by reference to the existence and application of the Contract, the Sub-Contract shall be administered and construed as though the Contract were continuing and the Sub-Contract shall therefore continue, subject to amendment only as necessary to reflect the fact that the Contract has in fact terminated and the Authority has undertaken the obligations set out in clauses 5.5 and 5.6.
- 5.13 The provisions of clause 5.1 shall not apply in circumstances where the Contract expires by effluxion of time in accordance with its terms.
- 5.14 The Service Provider agrees to the foregoing provisions of this clause 5 and agrees to be bound by them.

6 Continuing Service

- 6.1 Where the Authority is entitled to serve notice under clause 5.3 or under clause 5.7, the Authority may, in lieu of the service of notice as provided in such clauses, give notice under this clause 6.1 that the Authority does not intend to step in, but that in consideration of the payment to the Sub-Contractor of a fee calculated on the same basis as the fee payable under the Sub-Contract, the Authority requires the Sub-Contractor to continue to provide services (the **Continuing Service**) to the Authority from the Termination Date or from such other date as the Authority may specify for a period of six (6) Months (the **Extended Period**) (as may be extended pursuant to clause 6.3) from the Termination Date, or such other date (as the case may be).
- 6.2 In the event that the Authority gives notice under clause 6.1 then the Sub-Contract shall terminate in accordance with its terms and the Sub-Contractor shall enter into a new contract in writing with the Authority (or its appointee) on terms and conditions no more onerous than those set out in the Sub-Contract together with such amendments as the Authority and the Sub-Contractor shall agree for the performance of the Continuing Service (which shall be the same as the Sub-Contract Services except to the extent varied by the Authority) in consideration of the payment by the Authority to the Sub-Contractor of a fee calculated on the same basis as the fee payable under the Sub-Contract.

- 6.3 If the Sub-Contractor and the Authority agree to continue the provision of the Continuing Services beyond the Extended Period, such extension shall be upon the terms and conditions that shall be no more onerous than those referred to in the Sub-Contract and/or the terms and conditions that have applied during the Extended Period as may be amended by agreement between the parties.

7 Assistance

Obligations to Assist

- 7.1 The Sub-Contractor shall, upon termination of the Contract (whether or not the Authority serves notice under clauses 5.3 or 5.7, or requires the provision of the Continuing Services) provide assistance to the Authority with any transitional arrangements that may be required by the Authority to the extent reasonable and necessary to achieve the minimum disruption to the provision of the Service and an orderly handover and the implementation of an alternative to the Service, whether provided by the Authority or a third party (or as the Authority shall direct).
- 7.2 In effecting the transitional arrangements referred to in clause 7.1 the parties shall comply with all the relevant provisions of clause 33 (Employment Matters), clause 34 (Pensions) and clause 46 (Consequences of Termination/Expiry) of the Contract insofar as the same relate to the Sub-Contract Services.

Information required for tendering purposes

- 7.3 The Sub-Contractor shall, provide reasonable assistance to the Authority (subject to reimbursement of its reasonable costs and expenses in relation to the same) in the preparation of tender documentation and/or the provision of information to potential tenderers.

Good Faith

- 7.4 Each party to this Agreement agrees to act in good faith and co-operate with each other to facilitate the proper performance of this Agreement.

8 Extraneous rights

- 8.1 This Agreement shall not negate or diminish any duty or liability otherwise owed by the Sub-Contractor to the Authority.
- 8.2 The obligations and liabilities of the Sub-Contractor under or pursuant to this Agreement shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority.

9 Contracts (Rights of Third Parties) Act 1999

This Agreement is not intended to confer any rights on any third party pursuant to the Contracts (Rights of Third Parties) Act 1999.

10 Savings

10.1 Save for any claims arising out of or connected with clause 5 and (subject to the provisions thereof) clause 11 (so far as applicable to clause 5) the Authority shall not be entitled to commence any legal proceedings against the Sub-Contractor or the Guarantor under this Agreement before the Contract has been terminated or is otherwise of no force or effect.

10.2 Notwithstanding any other provision of this Agreement the duties and liabilities owed by the Sub-Contractor hereunder shall be no wider or greater than the duties and liabilities the Sub-Contractor would owe to the Authority under the Sub-Contract if (and the same defences to any claim brought by the Authority shall be available to the Sub-Contractor as if) in lieu of this Agreement the Authority had been a joint employer under the Sub-Contract provided that the Sub-Contractor shall not be entitled to raise in defence of any claim brought under this Agreement or to reduce any amount otherwise payable under this Agreement any set-off or counterclaim available to the Sub-Contractor under the Sub-Contract.

10.3 The Authority shall not be entitled to commence proceedings against the Sub-Contractor or the Guarantor under this Agreement in respect of any claim after the date on which any proceedings against the Sub-Contractor in respect of such claim would, if brought under the Sub-Contract, have been barred or statute barred (whichever shall be the first to occur).

11 Guarantee

11.1 If the Sub-Contractor in any respect fails to observe or perform any of its duties or obligations to the Authority under or in connection with this Agreement or if the Sub-Contractor fails to pay any debt, damages, interest or costs due from the Sub-Contractor to the Authority under or in connection with this Agreement then the Guarantor shall indemnify the Authority against all loss, damage, cost and expense incurred by the Authority by reason of such failure or non-payment as aforesaid and shall, if required to do so by notice in writing given by the Authority, itself pay to the Authority without any deduction or set off the amount of such debt, damages, interest or costs, as the case shall require.

11.2 The Sub-Contract and/or this Agreement may be modified, amended or supplemented in any manner whatsoever without the consent of the Guarantor, and no such modification, amendment or supplement shall release or impair the liability of the Guarantor under this Agreement which shall extend to the duties, obligations and liabilities of the Sub-Contractor under the Sub-Contract and this Agreement as so modified, amended or

supplemented. No invalidity in the Sub-Contract and/or in this Agreement nor the avoidance or termination of either shall affect or impair the liability of the Guarantor under this Agreement. No waiver or concession or allowance of time or compromise or forbearance given to or made with the Sub-Contractor (whether under the Sub-Contract or this Agreement) shall release, affect or impair the liability of the Guarantor under this Agreement and the terms hereof shall apply to the terms of such compromise as they apply to the Sub-Contract and/or this Agreement.

- 11.3 The liquidation or receivership or insolvency of the Sub-Contractor or any other act or thing which, but for this provision, would or might cause the obligations of the Guarantor contained in this clause 11 to be released shall not affect the liability of the Guarantor under this Agreement.
- 11.4 So long as any liability incurred by the Sub-Contractor to the Authority under or in connection with this Agreement remains unsatisfied, the Guarantor shall not in respect of any payment made or liability arising pursuant to the Sub-Contract and/or this Agreement, effect or seek to effect any recovery from the Sub-Contractor, whether by receipt of money or set off or proof of debt or enforcement of security or otherwise.
- 11.5 The Authority shall be entitled to recover no more from the Guarantor under this Agreement in respect of any matter, than the Authority would be entitled to recover from the Sub-Contractor in respect of that matter, net of any set-off.
- 11.6 The Authority shall not be obliged to pursue any means of recourse against the Sub-Contractor before being entitled to enforce this Agreement against the Guarantor and the Authority shall be at liberty to compromise, release, waive or neglect any security as it sees fit, without impairment of its rights under this Agreement.
- 11.7 Any money judgment of the court or arbitrator's award or decision of a duly appointed expert or adjudicator against the Sub-Contractor in favour of the Authority under this Agreement shall as against the Guarantor be conclusive evidence for the purposes of this Agreement as to any liability of the Sub-Contractor to which such judgment or award or decision relates (unless and until the same is set aside by any competent tribunal) but on condition that if the Authority commences any proceedings in court or arbitration proceedings or expert determination or adjudication against the Sub-Contractor under or in connection with this Agreement, it shall so notify the Guarantor in writing within twenty eight (28) days (or in the case of expert determination or adjudication, three (3) Business Days) after their commencement. The Authority and the Sub-Contractor and Project Co each agrees that if the Guarantor requests in writing within twenty eight (28) days (or in the case of expert determination or adjudication, three (3) Business Days) of such notification that it be joined as a party to or be heard in such proceedings, it will promptly take all reasonable steps within its power to have the Guarantor joined or given rights of audience in such proceedings.

12 Application of TUPE on expiry or termination⁴

12.1 The Authority and the Sub-Contractor agree that clauses [[♦] to [♦] (inclusive)] of the Sub-Contract shall apply in respect of this Agreement, save that:

- (a) any reference to Service Provider shall be read as a reference to Authority;
- (b) [any reference to Secondary Contractor shall be read as a reference to sub-contractor of the Sub-Contractor];
- (c) any references to New Employees and Existing Employees shall be read [in accordance with the definitions in clause ♦];
- (d) any reference to Service shall be read as a reference to Service and/or Continuing Services;
- (e) Any reference to Expiry Date shall be read as the Expiry Date and/or the end of the Extended Period;
- (f) [insert clauses dealing with specific amendments to the Sub-Contract].

13 Severability

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

14 Waiver

No term or provision of this Agreement shall be considered as waived by any party to this Agreement unless a waiver is given in writing by that party. No waiver shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

15 Governing law and interpretation

The law of this Agreement is English law and the English courts shall have jurisdiction with regard to all matters arising under it.

In witness whereof this document is executed by the parties or their duly authorised representatives as a Deed and delivered on the date of this agreement.

⁴ Employment legal advice should be obtained on a project specific basis to consider whether this clause is needed to give the necessary protection to the Authority.

Street Lighting Procurement Pack – Model Documentation

Executed as an Agreement by the affixing of the common seal of **[The Authority]** in the presence of:

)
) Authorised Officer
)
) Authorised Officer

Executed as an Agreement by **[The Sub-Contractor]** acting by two directors or by a director and its secretary

)
) Director
)
) Director/Secretary

Executed as an Agreement by **[The Service Provider]** acting by two directors or by a director and its secretary

)
) Director
)
) Director/Secretary

Executed as an Agreement by **[The Guarantor]** acting by two directors or by a director and its secretary

)
) Director
)
) Director/Secretary